Rock Bottom Stores, Inc. *and* Local 1199, Drug, Hospital and Health Care Employees Union. Case 29–CA–14689

September 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issue in this case is whether the Respondent, following the relocation of one of its facilities, violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and repudiating the collective-bargaining agreement that was in effect at its closed facility.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt his recommended Order.

The Respondent operates approximately 28 retail discount stores in the New York City metropolitan area. At the time of the instant dispute, the Union was the bargaining representative of employees at 20 of its stores, including the employees at its Commack, New York store.[2] In November 1988, the Respondent, along with various other employers with which it jointly bargained, signed a Memorandum of Agreement (MOA) which extended for 3 years the terms of a comprehensive 1985–1988 master collective-bargaining agreement and a 1987 supplemental agreement.[3] Although neither the master agreement nor the supplemental agreement had been signed by the Respondent, the terms of both were implemented by the Respondent. The MOA was applicable to the employees at Commack and the remaining union-represented stores.

In October 1989,[4] the Respondent informed the employees at its Commack store that it intended to close the store and relocate to a new facility approximately one-fourth mile away in East Northport. All the Commack employees were offered positions at the new store, and of the 18 employees who comprised the normal Commack work force, 13 employees accepted the transfer offers. About the same time that it announced its decision to relocate, the Respondent began hiring new employees consistent with its projections indicating a need for additional personnel to staff the larger East Northport store and to replace the five Commack employees who declined offers to transfer. Although East Northport had not yet opened, the Respondent assigned most of the newly hired employees to that store to train on the cash registers that had been installed there. Others, however, were assigned to train on cash registers at Commack because, according to the Respondent, there were not enough cash registers at East Northport on which all the new hires could train.

The Respondent closed the Commack store on November 15 and opened the East Northport store the next day, November 16. The Respondent stipulated that, with the exception of East Northport's size, which was about twice as large as the Commack store, ''there was no substantial change in the operations at the East Northport store from what we had at the Commack store.''

Three weeks prior to the move, the Union sent the Respondent a letter requesting that it bargain with the Union and observe the terms of the collective-bargaining agreement. The Respondent denied the request as premature. After the move, the Union renewed its request, but the Respondent again refused and filed an RM petition for an election to determine whether the East Northport employees desired union representation.[5] Beginning on November 16, the Respondent ceased making contractually required pension and welfare fund contributions.

The judge determined that the instant dispute was governed by *Harte & Co.*,[6] in which the Board held that ''an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement.''[7] Applying this principle to the instant case, the judge noted the parties' stipulation that the East Northport operations were substantially the same as at Commack and further found that when East Northport opened on November 16 there was a full complement of 52 employees working, 25, or 48 percent, of whom were transferees from Commack who had either been permanent employees at that store or had trained there for at least 2 weeks prior to the move. Therefore, he concluded that under the rationale of *Harte* and *Westwood*, the Respondent was obligated to continue to recognize the Union and apply the terms of the contract after the move to East Northport. By failing to do so, the judge found that the Respondent violated Section 8(a)(5) and (1).

[1] On September 17, 1992, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief. Thereafter, the Charging Party filed an answering brief, and the Respondent filed a reply to the General Counsel's cross-exceptions.

[2] The employees at three of the stores were represented by another union and the employees at the remaining five stores were unrepresented.

[3] There is no evidence that the Respondent agreed to be bound by multiemployer bargaining or that it is a member of a multiemployer bargaining group.

[4] All dates are in 1989 unless otherwise indicated.

[5] As discussed below, the petition is being held in abeyance by the Regional Director pending disposition of the instant case.

[6] 278 NLRB 947 (1986).

[7] Id. at 948, citing *Westwood Import Co.*, 251 NLRB 1213, 1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982).

In reaching this conclusion, the judge found, contrary to the Respondent's contention, that the MOA constituted a valid contract notwithstanding that it incorporated the terms of the unsigned master and supplemental agreements. Accordingly, he found that the MOA raised an irrebuttable presumption of union majority at the time of the relocation and throughout the 3-year term of the MOA.[8] The judge further found that assuming, arguendo, that the MOA was not a valid contract and thereby raised only a rebuttable presumption of union majority at the time the Respondent withdrew recognition, the Respondent presented insufficient evidence to overcome that presumption.

In its exceptions the Respondent contends that the Board's recent decision in *Gitano Distribution Center*,[9] which issued after the judge's decision, effectively overruled the ''40 percent or more'' rule set forth in *Harte* and *Westwood* and requires a majority showing at the relocated facility before an employer is obligated to recognize the union and apply an existing contract. Because the judge found that less than a majority (48 percent) of the East Northport work force was composed of Commack transferees, the Respondent contends that under *Gitano* the complaint must be dismissed.

Alternatively, the Respondent argues that even assuming the applicability of *Harte* and *Westwood*, the complaint must still be dismissed because the East Northport work force consisted of less than 40 percent of Commack transferees. In this regard, the Respondent asserts that the judge erred by counting as transferees some individuals who trained at Commack and by counting others who never worked at Commack. According to the Respondent, the number of employees to be counted as transferees should include only the 13 former Commack employees who transferred to East Northport, plus the 5 employees hired just before the move as replacements for the Commack employees who declined offers to transfer—a total of 18. Because this number constitutes less than 40 percent of the East Northport complement, the Respondent contends that regardless of what standard is applied it had no duty to recognize the Union or apply the contract there. Finally, the Respondent reiterates the argument, made to and rejected by the judge, that the MOA was not a valid contract and that it lawfully withdrew recognition from the Union based on a good-faith doubt of majority support.

The General Counsel and the Union argue that the majority test announced in *Gitano* does not apply here because that case involved a partial relocation rather than, as here, a total relocation and because in *Gitano*, unlike this case, there was no existing contract at the time of the relocation. They further note that the Board in *Gitano* did not expressly overrule *Harte* and *Westwood* and that nothing in *Gitano* compels the conclusion that those two cases were implicitly overruled. Alternatively, even if *Gitano* and its majority test is applicable, the General Counsel contends that the test has been met. Thus, in addition to the 18 employees conceded by the Respondent as transferees, the General Counsel would include 12 others who trained at Commack before the move—30 in all—which constitutes more than the majority showing required by *Gitano*.[10] In sum, the General Counsel contends that *Harte* and *Westwood* remain good law and control here; that the East Northport work force was composed of more than 50 percent of Commack transferees, satisfying even the *Gitano* test should the Board consider that case controlling; and that the judge correctly found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union at East Northport and repudiating the health and pension provisions of the MOA.

We agree with the judge that the Respondent violated the Act by withdrawing recognition from the Union at East Northport and by failing to apply the collective-bargaining agreement to the employees at that store.[11] In reaching this conclusion, we reaffirm the Board's decision in *Harte* and *Westwood* and reject the Respondent's contention that these decisions were implicitly overruled by the Board in *Gitano*.

Contrary to the Respondent's contention, the situation presented in *Gitano* is both factually and legally distinct from that presented in *Harte* and *Westwood*. In

[8] In the representation case, which was made a part of this record, the Regional Director reached a similar result by finding that the MOA was a binding contract which constituted a bar to the Respondent's election petition. Pursuant to the Respondent's request for review, the Board reversed the Regional Director in an unpublished decision dated September 19, 1991, and found that because its decision was being issued within 90 days preceding the MOA's October expiration date, it ''no longer bars the instant petition [and] the Regional Director may now process the petition.'' On remand, the Regional Director decided to hold the petition in abeyance pending disposition of the instant unfair labor practice case.

[9] 308 NLRB 1172 (1992).

[10] The General Counsel contends that the judge's figures are incorrect to the extent that he failed to include as transferees some employees who trained at Commack and that he included others who never worked at Commack. As to the latter point, therefore, the General Counsel and the Respondent are in agreement.

[11] We find no merit in the Respondent's contention that the MOA was not a valid contract. As the judge noted, the MOA, which the Respondent signed, specifically incorporated the unsigned master and supplemental agreements whose terms the Respondent admittedly implemented. Accordingly, we adopt the judge's finding that the MOA constituted a valid contract.

We reject the General Counsel's contention that the Commack store was part of a multifacility unit that included all the stores represented by the Union. There is no record evidence establishing whether the Respondent recognized the Union in one overall multifacility unit or rather in 20 individual store units. Absent such evidence, we shall, therefore, presume that Commack was a single-store unit and we shall further presume that the new East Northport facility constitutes a separate appropriate unit. See *Haag Drug Co.*, 169 NLRB 877 (1968).

Gitano, the employer transferred a portion of its bargaining unit, which was represented by a union, to a new facility and the remainder of the unit continued to operate out of the old facility. The issue presented to the Board was whether the respondent was obligated to recognize and bargain with the union as the exclusive bargaining representative of the employees at the new facility.[12] In resolving this issue, the Board, rejecting previous attempts by the Board to analyze such transfers as ''partial relocations'' or ''spinoffs,'' stated that it would begin with the ''long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit.'' *Gitano*, supra at 1173. If the presumption is not rebutted, the Board concluded that the employer must recognize and bargain with the union only ''[i]f a majority of the employees in the unit at the new facility are transferees from the original bargaining unit. . . .'' Id. The Board noted that because the new facility was presumptively a new unit it was irrelevant to the analysis the question of whether or to what extent the employees at the new facility were performing work that previously was performed by the unit employees at the old facility, and that the issue of whether an existing contract would be applicable to the new facility was not presented in the case. Id. at fn. 21.

From the above, it is clear that the Board in *Gitano* did not address the issue presented in the instant case, i.e., whether an employer who relocates an entire bargaining unit to a new facility is obligated to apply the collective-bargaining agreement in existence at the old facility to the new facility. It is equally clear that the Board's analysis in *Gitano*, starting with the issue of whether the relocated portion of the bargaining unit constitutes an appropriate bargaining unit separate from the remaining unit at the old facility, is inapplicable to situations where, as here, the entire bargaining unit is relocated and there has been no creation of a second bargaining unit. In addition, the existence of a collective-bargaining agreement at the old facility in the instant case clearly raises issues not raised in *Gitano*. Accordingly, we reject the Respondent's contention that the Board in *Gitano* implicitly overruled *Harte* and *Westwood*.

We reaffirm the analysis articulated by the Board in *Harte* and *Westwood*. As discussed above, the Board holds that an employer must apply an existing contract to a relocated facility if the operations at the new facility are substantially the same as those at the old and if the transferees from the old facility constitute a substantial percentage, defined as at least 40 percent, of the new facility's employee complement. In our view, this requirement constitutes an appropriate balance between (1) the transferees' interest in retaining the fruits of their collective activity and (2) the newly hired employees' interest in choosing whether or not to have union representation. Further, as noted in *Harte*, this rule is consistent with the Act's goal of fostering ''the national labor policy favor[ing] industrial stability achieved through the collective-bargaining process.'' *Harte*, 278 NLRB at 950, citing *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960).

There is no question in this case that the first prong of the *Harte* and *Westwood* test—that the operations of the new facility remain substantially the same as those at the old facility—has been met. Indeed, the parties stipulated to this fact. We thus turn to the second prong of the test—whether the transferees from the old facility constitute at least 40 percent of the new facility employee complement. Although we agree with the judge's conclusion that this prong was also met, we find that the judge erred in his computations regarding the number of employees working at East Northport on November 16 who should be counted as transferees from Commack.

It is undisputed that the 13 Commack employees who were offered and accepted transfers to East Northport are transferees. It is further undisputed that the five trainees[13] hired as replacements for the Commack employees who declined transfers to East Northport and who spent significant amounts of time training at Commack shall count as transferees.

The disagreement between the parties is whether 12 additional trainees[14] hired by the Respondent to work at East Northport but who trained at Commack for varying periods of time before the move[15] should also count as transferees.[16] In accordance with the Board's well-established rule first announced in *Arrow Co.*[17] and relied on by the Board in *Westwood*, 251 NLRB at 1214 fn. 8, we find, in agreement with the General Counsel's contention, that these 12 trainees should count as transferees. In this regard, we note the testimony of the Respondent's vice president of operations, Joseph Adonetti, that the trainees were hired on a permanent basis and that their date of seniority commenced on their first day of training at Commack. We further note, as did the court in *Westwood*, that there is no indication in the record that these employees did

[12] There was no collective-bargaining agreement in effect at the time of the relocation.

[13] Joan Caggiano, Christina Kaufman, Karen Koza, Christina Capobianco, and Lyle Wind.

[14] Those individuals are:

Deborah Mahoney	Karen Rosati
Cindy Southwick	Gwen Werbowsky
Lee Ann Rairigh	Theresa Camastro
Tammy Marrotta	Samantha Doti
Donna Porter	Theresa Sarducci
Stacy Petraitis	Marnie Sonenson

[15] The 12 trainees each worked anywhere from 3 to 24 hours at Commack.

[16] We agree with the parties that in fn. 6 of his decision the judge erroneously counted as transferees seven employees who never worked at Commack.

[17] 147 NLRB 829 (1964).

not receive the benefits of the collective-bargaining agreement during the time that they were employed in Commack. *Westwood Import Co. v. NLRB*, 681 F.2d 664, 667 (9th Cir. 1982). Finally, we note that, in terms of hiring and training, these 12 employees are indistinguishable from the 5 new employees who were hired to ''replace'' the 5 Commack employees who declined to transfer. As noted, the Respondent concedes that these five new employees should be counted as transferees.

In sum, we find that the total transferee complement consisted of the 13 former Commack employees plus 17 trainees, a total of 30, which constituted 56 percent of the 52 employee work force at East Northport.[18] In these circumstances, since both prongs of the *Harte* and *Westwood* test have been met, the Respondent was obligated to continue recognition of the Union at the East Northport store and to apply the terms of the existing contract at East Northport. By failing to do so, the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Rock Bottom Stores, Inc., East Northport, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[18] We agree with the judge's finding that the East Northport store opened with a complement of 52 employees. However, even if, as the Respondent contends, there were 57 employees, the transferees would constitute 52 percent of the unit.

David Cohen, Esq., for the General Counsel.
Marvin Goldstein, Esq., Stanley L. Goodman, Esq., and *Andrea Morganelli, Esq. (Grotta, Glassman & Hoffman)*, for the Respondent.
Mary E. Moriarty, Esq. (Eisner, Levy, Pollack & Ratner, P.C.), for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN Administrative Law Judge. This case was tried before me in Brooklyn, New York, on June 15, 18, and 25, 1992. The charge was filed on March 5, 1990, and the complaint issued on October 31, 1991. In substance, the complaint alleges that after the Respondent relocated operations from a store in Commack, New York, to East Northport, it refused to recognize and bargain with the Union despite the fact that the Union had been the collective-bargaining representative of the Commack employees. The complaint also alleges that since October 16, 1989, the Respondent has failed and refused to make monthly contributions to the contractual benefits and pension funds or to apply other terms and conditions set forth in a collective-bargaining agreement.

The Respondent, while acknowledging that the move from Commack to East Northport did not involve a substantial change in operations, contends that out of 56 employees at the new store, 13 were transferees from Commack. On the other hand, the General Counsel and the Charging Party disagree as to the Respondent's count and contend that at the time that the East Northport store became fully operational (November 16, 1989), at least 40 percent of its work force in bargaining unit classifications consisted of transferees from Commack. Accordingly, the complaint alleges that in accordance with the principles of *Westwood Import Co.*, 251 NLRB 1213, (1980), enfd. 681 F.2d 664 (9th Cir. 1982), the Respondent was obligated to recognize and bargain with the Union for the employees of East Northport and apply the terms and conditions of whatever collective-bargaining agreement was applicable to the Commack store employees.

In my opinion, the principal issues in this case are what principles are to be used in counting who was employed at Commack, who was employed at East Northport when that store became fully operational, and who should be considered a transferee as opposed to a new employee.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The predecessor of the Respondent was a company called Courtesy Drug-stores and that company had recognized the union on behalf of certain of its employees in the 1940s. When the Company became Rock Bottom Stores in 1978, (as a wholly owned subsidiary of Courtesy), the collective-bargaining relationship continued. In 1989, the Respondent had in the New York Metropolitan area, 28 discount stores (some but not all containing pharmacies), of which employees in 20 were represented by the Union, 3 were represented by another labor organization, and 4 were unrepresented. The present case involves the question whether the East Northport store should be included within the group represented by the Union or among the group without union representation.

The bargaining history for the period from 1985 to 1991 is somewhat confused. Based on the record, I do not believe that I can state nor the parties recall with certainty how they managed their contracts. However, I do not think that this is all that crucial.

It appears that in 1985, Courtesy and the Union negotiated the terms of a contract which, although unsigned, was put into effect. (This unexecuted agreement had a term from October 6, 1985, to October 8, 1988.) This agreement appears to have been based on the terms of another agreement be-

[1] The record includes the transcript and exhibits in Case 29–RM–780 which was filed on February 21, 1990, and which is presently being held in abeyance pending the outcome of this case.

tween the Union and the Empire State Pharmaceutical Society Inc., an employer association of which the Respondent was not a member.

In 1987, it appears that the Union and the Company negotiated the terms of a supplemental agreement modifying the terms of the unsigned 1985–1988 agreement, which was to be applied only to the Company's stores which were not drugstores and which were operated under the name Rock Bottom. By its terms, this supplemental agreement was to run from February 15, 1987, until February 15, 1990. This too was not executed by the parties although the terms and conditions set forth seem to have been implemented.

In November 1988, the Union entered into negotiations with a group of employers including Rock Bottom, Whalen Drug Co., Inc., Rite Aid Corp., Supermarkets General Corp., and Pathmark Supermarkets Division and, on November 29, 1988, entered into an executed memorandum of agreement with them. (At last something with a signature.) This memorandum established, inter alia, a general wage increase for 1988, 1989, and 1990, minimum wage scales for represented employees, cost-of-living increases, and benefit and pension fund contributions. The agreement provided for certain separate provisions applicable only to Rock Bottom and Pathmark and it states that the various outstanding collective-bargaining agreements and supplements ''which expired October 8, 1988 shall be renewed for a three year term to and including October 5, 1991,'' except as otherwise modified by the memorandum of agreement.

Until November 15, 1989, the Respondent operated a discount store in Commack, Long Island, which employed a normal complement of about 18 bargaining unit employees. (Clerks, cashiers, and stockpersons.) That store closed on November 15, 1989, and its operations were transferred to a new and larger store in East Northport which was about one-fourth mile away. There is agreement by the parties that the new store operated in substantially the same manner as the Commack store, the only difference being that it employed more people and had a lot more space. The East Northport store opened to the public and therefore was fully operational on November 16, 1989. Indeed, it would be fair to say that the new store opened up with a larger-than-normal complement of employees as it was overstaffed in an effort to make a good impression on prospective customers.

After the opening of the East Northport store, the Union sought but was denied recognition. On February 21, 1989, the Company filed a decertification petition in Case 29–RM–780 seeking to have the Board conduct an election to determine if the East Northport employees desired union representation. This petition was premised on the assertion that this was a new operation and therefore an election should be conducted to resolve the Union's claims to represent the employees. The Respondent does not assert that the petition, when filed, was based on employee statements or other objective considerations showing that its employees did not want to be represented by the Union.

On December 21, 1990, the Regional Director issued a decision in the RM case wherein he concluded that the East Northport store constituted a relocation of the Commack store and that a collective-bargaining agreement between the parties constituted a bar to conducting an election. (Presumably, the November 29, 1988 memorandum of agreement described above.)[2]

The Respondent filed a request for review and, on September 19, 1991, the Board issued an order stating, inter alia:

> The Board has held that a petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition, and the Board's decision issues on or after the 90th day preceding the expiration date of the contract. Such is the case here. In so finding, we do not pass on the arguments set forth by the Employer-Petitioner in its Request for review. We further find that as the collective-bargaining agreement, which will expire on October 5, 1991, no longer bars the instant petition, the Regional Director may now process the petition.
>
> Accordingly, we reverse the Regional Director's Decision and Order and remand the matter to the Regional Director for further consideration in light of this Decision.

Notwithstanding the above, the Regional Director did not proceed with an election because of the fact that this case was pending and the Union did not file a request to proceed.

In October 1991, the Company and the Union entered into an executed collective-bargaining agreement to run for a term from October 7, 1991, to October 9, 1994. This agreement covers the employees of the Rock Bottom stores that historically have been represented by the Union, except for East Northport. And as to this store, the parties, in effect, agreed to disagree and let the Board resolve the issue of representation one way or the other.

As noted above, the Commack store before it closed on November 15, 1989, had a normal complement of about 18 employees. The new East Northport store operated in essentially the same way except that it was about twice as large and employed more employees that the Commack store. The decision to close the store in Commack and open a new one in East Northport was made because the former's business had outgrown its available space. In relation to the two stores, the remaining inventory of Commack was moved, along with cash registers, to East Northport during the transition. The new store opened to the public and was more than fully staffed on November 16, 1989.[3]

As of the week ending Saturday, November 18, 1989, there were by my count, 52 bargaining unit employees working at the East Northport store.[4] Of this 52, all parties agree

---

[2] The Regional Director, although finding that a contract barred the Employer's RM petition, did not decide whether the appropriate unit should be limited to the employees at East Northport or should be a multistore unit. He rejected the Union's contention that the unit was a multiemployer unit or that it was a chainwide unit.

[3] Although the East Northport store opened up with 50 plus bargaining unit employees, its complement of such employees at the time of this hearing was about 30.

[4] I have excluded from the count a total of 11 out of the 63 employees that appear on the employer's payroll or on timecards for the week ending November 18, 1989. I have excluded William Cockrell, Matt Halstead, and John McCague because each of them left their employment before November 16, 1989, when the store opened. I have excluded Sean Alexander and Carlos Vasquez because they were only employed at East Northport to set up the facility and were not assigned to work at that location as permanent em-

that 13 clearly were transferees from the Commack store.[5] This leaves 39 other employees. As to these, the employer contends that all were new employees hired to staff the new store and that even if they appeared on Commack timecards before November 15, they were at Commack only because they were being trained there to work at East Northport. The General Counsel contends that many of this group worked substantial hours at the Commack store before it closed and therefore should be considered as transferees.

As of the week ending November 25, 1989, there were two other bargaining unit employees added to the store, these being Joe Badamo and Jeff Waldman. Additionally, it appears that a Santiago Quintana was hired during this week as a security employee.

The record establishes that the amount of time to train a cashier would be anywhere from a few hours to about 2 days, depending on aptitude. Although there is no evidence to show the amount of time that it would take to train a stockperson, it is difficult to imagine that it would take any longer than the time it takes to train a cashier.

The record also shows that there were 12 employees who worked at East Northport who worked at least 2 weeks in Commack before going over to the new store during the week ending November 18.[6] If we consider these 12 employees to be transferees, and not new hires, then the total group of transferees would be 25 or 48 percent of the East Northport complement of employees when it opened to the public. Also, assuming that 25 of the new store's employees are transferees, then the new store would have had to employ 63 unit employees in order for the percentage of transferees to be less than 40 percent.

The Respondent introduced evidence that the number of dues-paying union members at the Commack store and even among the Respondent's group of union represented stores was less than a majority during the period of time immediately preceding the transfer to East Northport. It did not, however, produce any other evidence indicating that these employees, even if not paying union dues, did not desire union representation.

III. ANALYSIS

This case is ruled by the law governing relocations. In *Harte & Co.*, 278 NLRB 947, 948 (1986), the Board held that a union is entitled to continued recognition and to have any existing contract honored, if at the time that a relocation is substantially completed, 40 percent or more of the new facility's employees came from the previously represented facility.

In the present case, it is my opinion that the transfer of operations from Commack to East Northport was substantially completed by November 16, 1989, which was the day after Commack was closed and the day that East Northport opened to the public. And as of the end of that week (payroll week ending, November 18, 1989), the new store employed 52 bargaining unit employees, of which 25 were, in my opinion, transferees.[7] As the number of transferees exceeded 40 percent, the Respondent, under that rationale of *Harte & Co.*, is obligated to continue to recognize and bargain with the Union.

It also appears to me that as of November 15, 1989, there was in effect a valid labor contract between the Respondent and the Union which covered the salesclerks, cashiers, and stock employees of the Commack store. This was the handwritten memorandum of agreement dated November 29, 1988, which, among other things, regulated for a 3-year pe-

---

ployees in bargaining unit job classifications. Also excluded are the security employees Gerald Husk, Leonard Loveridge, Michael Lanaia, and Tony Sclafani as all parties agree that guards are excluded from the bargaining unit. Finally, I have excluded Kimberly Quinn and Lisa Zaimis who were employed as boutique employees, a job classification that historically has not been included in the bargaining unit.

[5] The conceded transferees were John Cooke, Phillip Drago, Janet Lipari, Ellen Nessanbaum, Peter O'Brien, Donna Olson, Kitty Pennachia, Carrie Quinn, Mark Quintana, Michele Russell, Dennis Steiness, Fran Wansor, and Jennifer Zieler. As to Steiness, the evidence shows that although he was transferred from Commack to East Northport, he was out sick for the first week and therefore he did not punch a timecard.

[6] These were as follows:

(1) Joan Caggiano worked at Commack 20 plus hours during the weeks ending November 4 and 11, 1989.

(2) Kenney Campbell worked at Commack 30 plus hours during the weeks ending November 4 and 11, 1989.

(3) Chris Capobianco worked at Commack 18 hours during the week ending November 4 and 25 hours during the week ending November 11.

(4) Paul Chereck worked at Commack 16 hours during the week ending October 28, 25 plus hours during the week ending November 4, and 21 hours during the week ending November 11, 1989.

(5) Michael Ferraro worked at Commack 37 hours during the week ending November 4 and 31 hours during the week ending November 11, 1989.

(6) Patricia Grillo worked at Commack 12 hours during the week ending October 21, 27 plus hours during the week ending October 28, 26 plus hours during the week ending November 4, and 30 hours during the week ending November 11, 1989.

(7) Peter Hoyt worked at Commack 12 plus hours during the week ending October 28, 23 hours during the week ending November 4, and 17 plus hours during the week ending November 11, 1989.

(8) Chistina Kaufman worked at Commack 18 hours during the week ending October 28, 22 plus hours for the week ending November 4, and 11 plus hours for the week ending November 11, 1989.

(9) Karen Koza worked at Commack 22 hours during the week ending November 4 and 20 plus hours during the week ending November 11.

(10) Brian Mosher worked at Commack 3 hours during the week ending October 28, 25 hours during the week ending November 4, and 15 plus hours during the week ending November 11, 1989.

(11) Ed Roe worked at Commack 16 hours during the week ending October 21, 30 plus hours during the week ending October 28, 35 hours during the week ending November 4, and 42 hours during the week ending November 11, 1989.

(12) Lyle Wind worked at Commack 19 plus hours during the week ending October 28, 20 hours during the week ending November 4, and 19 hours during the week ending November 11.

Although both the Commack and East Northport stores were designated for a time as store 50, the timecards for each are distinguishable. The East Northport store used a timecard that has a smaller type face and contains more information.

[7] [Attached here as App. A.] In my opinion, the employees who worked substantial hours at the Commack store for at least 2 weeks before the week of the relocation, should be considered transferees and not new hires. In *Westwood Import Co.*, 251 NLRB 1213 (1980), the Board held to be transferees, six employees who worked at an old facility from 1 to 6 weeks before it was relocated and despite the fact that they were hired with the expectation that they would be working at the new facility.

riod terms and conditions of employment of those of Respondent's employees who had historically been represented by the Union over a period of time going back to the 1940s. There is no question that but for the relocation of the Commack store to East Northport, the employees in that store would have continued to be covered by the 1989 memorandum of agreement and the subsequent contract which was executed in October 1991. Accordingly, it is concluded that as there was a contract in effect at the time of the relocation, which by operation of law continued in effect thereafter, it follows that there was an irrebutable presumption that the Union continued to represent a majority of the employees. *W. A. Krueger Co*., 299 NLRB 914 (1990); *Westwood Import Co*., 251 NLRB 1213 (1980).

Moreover, even assuming that there was no existing collective-bargaining agreement at the time of the relocation, there would still have been a rebuttable presumption of majority status. And in my opinion such a presumption has not been overcome in the present case solely by evidence that a majority of the units employees were not paying dues. *NLRB v. Walkill Valley General Hospital*, 866 F.2d 633, 637 (3d Cir. 1989).

Nevertheless, having found that the 1988 memorandum of agreement constituted a valid contract, establishing binding terms and conditions of employment for the Commack employees both before and after the relocation to East Northport, it is concluded that the Respondent, to the extent that it failed and refused to apply the terms of that agreement to the employees in question, violated Section 8(a)(1) and (5) of the Act.

The Respondent contends that as the Board in the representation case (29–RM–780), found that ''the contract'' did not constitute a bar, a question concerning representation existed and therefore precludes any finding that it refused to bargain with the Union, at least after the agreement expired on October 5, 1991. I disagree.

The Board's conclusion in the representation case was only that the memorandum of agreement, having expired on or after the 90th day of the Board's decision, would not be considered as a ''contract bar.'' The Board did not, however, make any conclusions as to the appropriateness of the unit and remanded the proceeding to the Regional Director for further consideration. Whether or not a question concerning representation could have been raised at the conclusion of the term of the memorandum of agreement, and irrespective of any future finding as to what group of employees should vote in an election, there is no question but that the memorandum of agreement was a valid contract which the Respondent was obligated to honor under the provisions of Section 8(d) of the Act. Moreover, until and unless the Union is ousted by means permissible under the National Labor Relations Act,[8] it is my opinion that the Respondent was bound to honor any succeeding contract which, by historical practice, would have covered these employees but for the relocation.

[8] Sec. 9 of the Act permits and provides a concrete procedure whereby an employer or employees, under particular circumstances, may file a petition to decertify an existing union. The Act also permits, under appropriate circumstances, another union to file a representation petition seeking to persuade employees represented by an incumbent union to switch their allegiance.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, on or after November 16, 1989, to bargain with the Union and withdrawing recognition from the Union as the exclusive bargaining representative of certain of its employees at its East Northport store, the Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By refusing and failing to honor and abide by the terms and conditions of the memorandum of understanding dated November 29, 1988, and a subsequent collective-bargaining agreement expiring on October 9, 1994, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. It is recommended that the Respondent be ordered to abide by the terms and conditions of the above-described agreements and to the extent that they have not done so, make all fringe benefit contributions as required by such contracts, with interest determined under the standards set forth in *Merryweather Optical Co*., 240 NLRB 1213 (1979). I also recommend that the Respondent make whole any unit employees for any loss that they may have suffered from Respondent's failure to make such contributions, in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1989), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Rock Bottom Stores, Inc., East Northport, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 1199, Drug, Hospital and Health Care Employees Union, or withdrawing recognition from said Union as the exclusive bargaining representative of the cashiers, salesclerks, and stockpersons employed by Respondent at its East Northport store.

(b) Refusing or failing to honor and abide by the terms and conditions of the memorandum of understanding dated November 29, 1988, and a subsequent collective-bargaining agreement expiring on October 9, 1994.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the cashiers, salesclerks, and stockpersons, employed at its East Northport store.

(b) To the extent not already done, make all fringe benefit contributions as provided in the memorandum of agreement dated November 29, 1989, and the collective-bargaining agreement executed in October 1991, expiring on October 9, 1994, and make whole the unit employees in the manner set forth in the remedy section of this decision by reimbursing them with interest, for any losses (including lost wage increases) they may have suffered as a result of Respondent's failure to abide by the terms of the aforesaid contracts.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in East Northport, New York, copies of the attached notice marked ''Appendix B.''[10] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

Employees working at East Northport as of the payroll period ending November 18, 1989.

Alexander, Sean (Setup employee)
Brown, Scott
Burulcich, Lynette
Caggiano, Joan
Camastro, Teresa
Campbell, Kenny
Capobianco, Chrissy
Cerrato, Tom
Chereck, Paul
Cockrell, William (Left before 11/16)
Corrao, Joan
Cooke, John (Conceded transferee)
D'Abruzzo, Thomas
Doti, Samantha
Drago, Phillip (Conceded transferee)
Ferraro, Michael
Grillo, Patricia
Halstead, Matt (Left before 11/16)
Hochman, Scott
Horner, Michael
Hoyt, Peter
Husk, Gerald (Security employee)
Kaiden, Doug
Kaufman, Christina
Koza, Karen
Lanaia, Michael (Security employee)
Larsen, Joyce
Lipari, Janet (Conceded transferee)
Lomangino
Loveridge, Leonard (Security employee)
Mahoney, Debbie
Marotta, Tammy
Morris, Michele
Mosher, Brian
McCague, John (Left before 11/16)
Nessanbaum, Ellen (Conceded transferee)
O'Brien, Peter (Conceded transferee)
Olson, Donna (Conceded transferee)
Pennachia, Kitty (Conceded transferee)
Petraitis, Stacy
Porter, Donna
Pshenay, Judy
Quinn, Carrie (Conceded transferee)
Quinn, Kimberly (Boutique employee)
Quintana, Mark (Conceded transferee)
Rairigh, LeeAnn
Roe, Ed
Rosati, Karen
Russell, Michele (Conceded transferee)
Sarducci, Theresa
Schwartz, Mindy
Sclafani, Tony (Security employee)
Sonenson, Marnie
Southwick, Cindy
Steiness, Dennis (Conceded transferee)
Tinnuci, Gloria
Vasquez Carlos (Setup employee)
Wansor, Fran (Conceded transferee)
Werbowsky, Gwen
Williams, Inez
Wind, Lyle
Zaimis, Lisa (Boutique employee)
Zieler, Jennifer (Conceded transferee)

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Local 1199, Drug, Hospital and Health Care Employees Union, or withdraw recognition from said Union as the exclusive bargaining representative of the cashiers, salesclerks, and stockpersons employed by us at our East Northport store.

WE WILL NOT refuse or fail to honor and abide by the terms and conditions of the memorandum of understanding dated November 29, 1988, and the subsequent collective-bargaining agreement which does not expire until October 9, 1994.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the cashiers, salesclerks, and stockpersons employed at our East Northport store.

WE WILL, to the extent not already done, make all fringe benefit contributions as provided in the memorandum of agreement dated November 29, 1989, and the collective-bargaining agreement executed in October 1991 and make whole the employees covered by said agreements by reimbursing them with interest, for any losses (including lost wage increases) that they may have suffered as a result of our failure to abide by the terms of the aforesaid contracts.

ROCK BOTTOM STORES, INC.